

TANZANIA / JUDGMENT

hussein hassan v republic

2023 tzhc 18489 26 june 2023

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (TABORA DISTRICT REGISTRY)
AT TABORA DC CRIMINAL APPEAL NO. 01 OF 2023 (From the decision of the District Court of
Tabora, Original Criminal Case No. 02 of 2022, before Hon. S. I. Mzige - RM) HUSSEIN
HASSAN..... APPELLANT VERSUS THE
REPUBLIC..... RESPONDENT

JUDGMENT

Date of Last Order: 12/06/2023 Date of Judgment: 26/06/2023 KADILU, J. In the District Court of Tabora, the appellant was charged with the offence of assault causing grievous bodily harm contrary to Section 225 of the Penal Code [Cap. 16, R.E. 2019]. At the conclusion of the trial, the appellant was convicted and sentenced to serve five (5) years imprisonment. He was further ordered to pay compensation of one million Tanzania shillings (1,000,000/=) to the victim. Dissatisfied with the conviction and sentence, the appellant preferred the instant appeal based on the following grounds:

1. That, the prosecution did not prove the case against the appellant beyond reasonable doubt as required by the law.
2. That, the learned trial Magistrate erred in law and fact for failure to direct her mind to the issue as to whether the appellant intended to cause harm to the victim while the injury occurred when the appellant was exercising his right to self-defence.
3. That, the learned trial Magistrate erred in law and fact for failure to direct her mind to material discrepancies in the testimonies of PW1 and PW4 regarding the weapon used to cause injuries to the victim of the offence.
4. That, the sentence imposed upon the appellant was manifestly excessive. The appellant prayed this court to allow the appeal, quash the conviction, set aside the sentence and order his release from the prison. When the appeal was called for hearing, the appellant appeared in person, unrepresented. The respondent was represented by Ms. Suzan Barnabas assisted by Ms. Tunosye John Luketa and Ms. Joyce Nkwabi, all learned State Attorneys. Brief background of the case is that, the victim is one Haji Ramadhani @ Mlela who was a close

friend of the appellant. It was alleged that on 19/12/2021 near Tabora Urban Primary Court, Gongoni Ward within Municipality and Region of Tabora, the appellant assaulted Haji Ramadhani @ Mlela with a stick. The quarrel arose after the appellant claimed to be repaid his money he had lent to the victim. On the date of the incident, the victim called the appellant requiring him to go at his place of business to collect his money. On arrival, the victim told the appellant that he would not give him the money and that the appellant was free to do whatever he wished. 2 The appellant took a litre of oil, OKO and one litre of brake fluid so that he could sell to a nearby shop and recover his money. As he was leaving the place, the victim grabbed him on the neck saying that he would teach him a lesson. The appellant tried to escape, but the victim held the appellant's bicycle. The victim went back to the garage quickly and picked a knife saying he would kill the appellant. At that point, the appellant picked up a piece of wood and directed it to the head of the victim. The wood hit the victim's hands as he was preventing his head from being injured. The log caused breakage of the victim's left-hand finger which was later amputated. During the hearing, the appellant prayed to add a new ground of appeal to the effect that the memorandum of undisputed facts was not read over and explained to him by the trial Magistrate. Submitting on the second ground of appeal, the appellant stated that he did not intend to injure the victim as they were close friends. He added that the victim was injured while the appellant was exercising his right to self-defence. The appellant explained more that the victim was prepared to kill him because he carried a knife and attacked the appellant who had no weapon at that time. Regarding the third ground of appeal, the appellant stated that there was contradiction between the testimony of PW1 and PW4 concerning the type of weapon used in beating the victim. According to the appellant, PW1 told the trial court that the appellant used a log whereas PW4 informed the court that the appellant used an iron bar, but the discrepancy was not considered by the trial court. He added that there was no x-rays report which 3 was tendered during the trial to prove that the victim was injured seriously. He implored the court to allow the appeal as the prosecution did not prove the charge against him beyond reasonable doubt. Responding to the submission by the appellant, Ms. Suzan stated that even though the appellant had acted in self-defence, the force used was unreasonably excessive. The learned State Attorney explained that the appellant intended to kill the victim because he directed the log to the head of the victim. The victim was preventing his head from being hit by the log when he was injured on his fingers. On the discrepancy between evidence of PW1 and PW4, Ms. Suzan explained that they both meant the same thing although the words used are different. The State Attorney explained that the name of a weapon used is less important as long as it is undisputed that the appellant caused grievous injury to the victim. Ms. Suzan argued that it is an afterthought by the appellant to raise an allegation that the trial court's Magistrate did not read over and explain to him the memorandum of undisputed facts. She said that it was done and the appellant had signed. To support her argument, the State Attorney referred this court to page 6 of the trial court's typed proceedings. Relating to the appellant's complaint that the sentence imposed on him was excessive, Ms. Suzan refuted the allegation. She informed the court that under Section 225 of the Penal Code, the appellant was supposed to be 4 imprisoned for seven (7) years, but

the trial court imprisoned him for five

- (5) years and ordered him to pay compensation of one million Tanzania shillings (1,000,000/=) only to the victim to whom the appellant has caused permanent disability. It was Ms. Suzan's prayer to the court to dismiss the appeal and uphold decision of the trial court as the prosecution proved the case against the appellant beyond reasonable doubt by using oral and documentary evidence. Having gone through the grounds of appeal set out in the petition of appeal and submissions by the parties, the issue for determination is whether or not the appeal has merits. In the case of William Ntumbi v DPP, Criminal Appeal No. 320 of 2019, the Court of Appeal cited with approval the case of Woodmington v DPP (1935) AC 462 in which it was stated that, in criminal trials, duty of the prosecution to prove the case beyond reasonable doubt is universal and the standard of proof is beyond reasonable doubt. The term beyond reasonable doubt is not statutorily defined, but case laws have defined it. For example, in the case of Magendo Paul & Another v R. [1993] TLR 219, the Court held that, for a case to be taken to have been proved beyond reasonable doubt, the prosecution evidence must be strong against the accused person as to leave a remote possibility in his favour which can easily be dismissed. Therefore, the phrase 'beyond reasonable doubt' means that, the proposition being presented by the prosecution must be proven to the extent that there could be no reasonable doubt in the mind of a reasonable person that the accused person is guilty. This does not mean that there should be no doubt at all. There can still be a doubt, but only to the extent that it would not affect a reasonable person's belief regarding whether or not the accused is guilty. I hasten to state at this point that, in the instant appeal, I am firm that the prosecution proved the case to the standard required by the law. As rightly argued by the learned State Attorney, there is no dispute that the appellant caused grievous bodily harm to the victim. At page 27 of the trial court's proceedings, the appellant stated in his defence that he used a piece of wood to beat the victim. Thus, I find the first and third grounds of appeal devoid of merit and I dismiss it. The appellant complains further that there were contradictions between evidence of PW1 and PW4. Ms. Suzan submitted that the inconsistencies were more of form than substance. I am alive that where there are contradictions in any of the testimonies, it is the duty of the court to determine whether they are material going to the root of the case or just minor discrepancies which may be disregarded. The Court of Appeal emphasized this position in the case of Marando S/aa Hofu and 3 Others v R. Criminal Appeal No. 246 of 2011. In the case at hand, I consider the differences in the name of a weapon used in injuring the victim as a minor contradiction which deserves to be disregarded. 6 It is the appellant's contention that the injury occurred while he was defending himself. The records reveal that when the charge was read over and explained to the appellant, he did not raise the defence of self-defence. In his grounds of appeal, he indicated that the defence was raised after the prosecution case was closed. It is worth noting that the right to self-defence has its limit as provided under Section 18A of the Penal Code. The defence is subject to limitations set out under section 18B (2) which provides that: "Every person shall be criminally liable for any offence resulting from excessive force used in self-defence or defence of another or in

defence of property." Proceedings of the trial court reveal that the appellant testified that he was attacked by the victim who had a knife. In the circumstances, I am not persuaded by the State Attorney's argument that the appellant employed an excessive force in exercising his right to self-defence because he just picked a piece of wood which was easily accessible to him at that time. Comparing a knife with a piece of wood, I do not think the appellant used a greater degree of force as alleged. As such, I allow the second ground of appeal. The last complaint by the appellant is that the sentence imposed on him was excessive. This ground of appeal needs not to detain me much as Section 225 of the Penal Code is very clear about punishment for causing grievous bodily harm. As rightly articulated by the learned State Attorney, punishment for the offence of causing grievous bodily harm is imprisonment for seven (7) years. In the present case, the appellant was sentenced to five 7 years imprisonment and payment of compensation of one million Tanzania shillings (1,000,000/=) to the victim. It is trite law that a sentence that is manifestly excessive or patently inadequate may be altered on appeal. However, an appellate court is not empowered to alter a sentence on a mere ground that if it had been trying the case, it might have passed a somewhat different sentence. The point was observed by the Court of Appeal in the case of Yusufu Abdalla Ally v R., Criminal Appeal No. 300 of 2009, where it was stated that an appellate court may alter a sentence imposed by a trial court where the sentence is manifestly excessive or inadequate, the sentence is based upon a wrong principle of sentencing or law, a trial court overlooked a material factor, the sentence is based on irrelevant factors, the sentence is plainly illegal, or it does not take into consideration the long period an appellant spent in remand or police custody awaiting trial. Given the circumstances of this case, I am of the view that the trial court overlooked material factors and imposed excessive sentence upon the appellant. It is on record that after conviction the appellant advanced several mitigating factors. Nevertheless, the same were not considered sufficiently. Consequently, I find the fourth ground of appeal meritorious. In view of the foregoing, the appeal succeeds partly and fails partly. I order the appellant to pay compensation of five-hundred thousand Tanzania shillings (500,000/=) to the victim. In default to pay the compensation, the appellant shall suffer imprisonment for a term of twelve (12) months in prison from the date of this order. 8 Order accordingly. DILU, MJ. JUDGE 26/06/2023 Judgment delivered in Chambers on the 26th Day of June, 2023 in the presence of Mr. Hussein Hassan, the appellant and Ms. Joyce Nkwabi, Suzan Barnabas, Aziza Mfinanga and Upendo Florian, all State Attorneys for the respondent, Republic. KADILU, MJ. JUDGE 26/06/2023 9

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